IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 104 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KOCHAKKADAM KUNJUVAVEED THOMAS

Versus

D R GOHIL SUPDT. OF CUSTOMS

Appearance:

MR JR DAVE for Petitioner

MR JS YADAV for Respondent No. 1

Mr K G Sheth, APP for Respondent No. 2

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 22/06/2001

C A V JUDGEMENT

This Criminal Revision Application under section 397 of the Criminal Procedure Code, 1973 has been preferred by the petitioner above named, who was accused no.3 before the learned Addl.Chief Metropolitan

Magistrate at Ahmedabad in Criminal Case No.332/98. The learned Magistrate found him guilty of offence punishable under Section 135 of the Customs Act, 1962, read with section 120-B of the Indian Penal Code and sentenced him to suffer R.I. for four years and to pay fine of Rs.10,000/in default of payment of fine, he was required to further undergo S.I. for six months. Facts leading to this Revision may be briefly stated as follows:

On 18.1.1998, an information was received by the officers of the Customs Department that contraband gold was to be imported in Indian Airlines Passenger Coach No.GJ-IX-9042 bringing the passengers of Flight No.IC 886 from Muscat to Ahmedabad. That the said prohibited gold was to be taken with the passengers concerned to the arrival gate. Therefore, the officers of the Customs Department kept vigilance over the passengers coming from that flight. Ultimately, on enquiry, it was found that a packet was noticed in the machine tool box of the said passenger coach. It was also noticed that there were 48 gold biscuits of foreign mark. The total weight of the said gold biscuits was 5616 grams and the value thereof was assessed as Rs.23,28,000/-. It was further noticed that in the said tool box, a packet was there containing 3110 U.S. dollars equivalent to Rs.1,23,000/- in Indian currency. The said flight arrived at Ahmedabad Airport at 3.50 a.m. on 18.1.1998. A Panchnama was prepared and accused persons were arrested. During the course of enquiry, it was noticed that the present petitioner was accused no.3 in the said matter. He was the driver of the said coach and he was actively involved in assisting commissioning of the said offence and, therefore, all the three accused persons were brought to the Court by way of a complaint filed by the Customs Superintendent at Ahmedabad. The said complaint proceeded ahead resulting in conviction of all the three accused persons including the present petitioner.

2. The present petitioner preferred Criminal Appeal being Criminal Appeal No.66/2000 before the City Sessions Court at Ahmedabad. In fact, all the three accused persons preferred different Criminal Appeals against their conviction . We are not concerned with Criminal Appeals No.56 and 59/2000 filed by the other two persons. We are concerned with Appeal No.66/2000 filed by the present petitioner before the City Sessions Court, Ahmedabad. After hearing the parties, learned Addl.Sessions Judge dismissed the appeal of the present petitioner and confirmed the conviction and sentence awarded to him by the learned Addl.Chief Metropolitan Magistrate.

3. Feeling aggrieved by the said judgment and order of the learned Addl.City Sessions Judge in Appeal No.66/2000, the petitioner has preferred this Revision before this Court under section 397 of the Code of Criminal Procedure, 1973 (for short, 'the Code').

4. It has been mainly contended here that there was no material before the two courts below to hold the present petitioner guilty for the offence in question. That the two courts below have committed illegality in considering the statement of the present petitioner recorded under section 108 of the Customs Act, 1962 (for short, 'the Act') That the officer recorded statement had not followed the procedure required to be followed before recording the said statement of the present petitioner. That the judgments and conviction orders recorded by the two courts below are otherwise also illegal and erroneous, that even the punishment awarded to the petitioner is too harsh, looking to the evidence against him. That the courts below have not considered the provisions of section 360 of the Code as well as the provisions made under the Probation of Offenders, 1958. That therefore, the judgment and orders of the two courts below are illegal and erroneous and perverse and, therefore, they are required to be quashed and set aside. The petitioner has, therefore, prayed that the present petition be allowed and the judgment and conviction orders of the two courts below be quashed and set aside and the petitioner be acquitted of the aforesaid offence and he be set at liberty forthwith.

5. On receiving the Revision Application, notices were issued to the respondents and in answer to the said notices, Mr J R Jadhav, learned Advocate has appeared before this Court on behalf of respondent no.1. Mr K G Sheth, learned APP has appeared on behalf of the State of Gujarat-respondent no.2. I have heard the learned Advocates for the parties and have perused the papers. In fact, the learned Advocates for the parties have taken me through the judgments of the two courts below. Learned Advocate for the petitioner has mainly and substantially argued before this Court that the two courts below have committed serious illegality in relying upon he statements made by the present petitioner under section 108 of the Act. It has been contended by him that the procedure required to be followed was actually not followed and, therefore, the two courts below could not have looked into the said statements and the statement said to have been made by the petitioner does not and did not bind him and no reliance could be placed

on the said statement of the present petitioner.

6. In order to elaborate the said argument, learned Advocate for the petitioner has contended that before recording a statement under section 108 of the Act, the officer who recorded such statement, was required to follow certain procedure laid down in section 164 of the Code. It has also been argued by him that the officer empowered to record the statement did not follow the procedure laid down in section 164 of the Code in general and the procedure laid down in sub-section (ii) of section 164 of the Code in particular.

7. In order to appreciate the aforesaid argument, it would be relevant to reproduce the provisions made in section 164 of the Code hereinbelow:

"164. Recording of confessions and statements -(1) Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in he case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards before the commencement of the inquiry or trial:

Provided that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him, and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall b recorded in the manner provided in section 281 for recording the examination of an accused person and shall be

signed by the person making the confession, and the Magistrate shall make a memorandum at the foot of such record to the following effect -

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(signed) A.B.
Magistrate"

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case, and the Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) The Magistrate recording a confession or statement under the section shall forward it to the Magistrate by whom the case is to be inquired into or tried."

8. On a bare perusal of section 164 of the Code, it becomes very clear that the procedure to be followed while recording confession and statement under section 164 is indicated in the section itself. Sub-section (2) of section 164 of the Code makes it clear that before recording any confession, the Magistrate shall explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him, and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is not being made voluntarily. Now, it is very clear that while recording statement and confession under section 164 of the Code, the Magistrate recording the statement is aware of the position that the accused brought to him is going to make a confessional statement before him. Even the accused person, taken to the Magistrate, knows that he is

to make a confessional statement. The police investigating agency producing he accused before the Magistrate concerned is also aware of the aforesaid provision. In other words, before commencing of recording a confessional statement, everybody is aware of the fact that confessional statement is going to be made by the accused person in presence of a Magistrate. At that time, everybody knows that such a statement can be used against the person if he makes it. Then it is further made clear that if such an accused person is not willing to make confession, the learned Magistrate was not authorised to permit further detention of the person concerned in police custody. Then it is further made clear that while recording confessional statement, it is required to be recorded in the manner provided in section 281 of the Code for recording the examination of an accused person and shall be signed by the person making the confession, and the Magistrate shall make a memorandum at the foot of such record in the proforma given in sub-section (4) of section 164 of the Code. The position with respect to recording of statement under section 108 of the Act is quite different. It is, therefore, relevant, pertinent and important to reproduce the provision made in section 108 of the Act as under:

"108. Power to summon persons to give evidence and produce documents: (1) Any Gazetted Officer of customs shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in concession with the smuggling of any goods.

(2) A summon to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorized agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required;

provided that the exemption under section 132 of the Code of Civil Procedure, 1908 shall be

applicable by any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code."

On a bare perusal of section 108 of the Act, it becomes clear that any Gazetted Officer of the Customs has power to summon any person to give evidence or to produce a document or any other thing in any enquiry which such officer is making in connection with the smuggling of any goods. It is nowhere provided in section 108 of the Act that the officer recording a statement or entering into an enquiry is required to give a caution or a notice to the deponent that he was not bound to make a statement and that even if he makes a statement, it would be used against him. Therefore, the provision contained in section 108 of the Customs Act is quite different from the provisions made in section 164 of the Code. The objects of recording statement under section 108 of the Act is different from the object for recording statement under section 164 of the Code. The consequences are also different. Therefore, the provision made in section 108 of the Act is not comparable with the provision of section 164 of the Code. While recording the statement under section 108 of the Act, the person whose statement is required to be recorded may or may not be an accused person. On the other hand, the confessional statement to be recorded under section 164 of the Code would naturally be a statement of an accused person. Therefore, the procedures have been envisaged and they are required to be followed before recording confessional statement under section 164 of the Code. Therefore, the provisions made in section 164 of the Code cannot be projected in section 108 of the Act. In the aforesaid view of the matter, it cannot be said that the empowered officer was required to follow provisions made in section 164 of the Code while recording statement of the petitioner under section 108 of he Act.

9. It will be seen that when a statement is going to be recorded under section 108 of the Act, the officer who records statement may not know that the person whose statement is going to be recorded, is going to admit certain information against his own interest. He may not know if the person whose statement is going to be recorded would make confessional statement. In fact, he may not know as to what he is going to get from the mouth of the person whose statement is going to be recorded.

So even from this angle, the object of recording statement under section 108 of the Act is quite different from the object of recording of statement under section 164 of the Code. As said above, the consequences are also different. In that view of the matter, it is not possible to agree with the argument of the learned Advocate for the petitioner that the officer empower to record statement under section 108 of the Act was required to give caution and notice to the petitioner before recording such statement in accordance with the provisions of section 164 of the Code.

10. Learned Advocate for the petitioner has relied upon a decision in the case of N S R Krishna Prasad v. Directorate of Enforcement reported in 1992 Cr.L.J. 1888. The Division Bench of the Hon'ble High Court of Andhra Pradesh has considered the provisions made in Section 108 of the Act as well as provisions made in section 164 of the Code. There the Division Bench of the said Ccourt has observed that an empowered authority seeking to record confession must administer warning or caution contemplated under section 164 (2) of the Code to concerned person that it would be used against him. It is further observed that non-compliance of the said provisions contained in section 164(2) of the Code is not curable under section 463 of the Code and renders the statement so recorded, inadmissible in evidence.

11. Firstly, this is not a decision of this Court or of the Apex Court and secondly, while observing as aforesaid, the provisions made in section 108 of the Act was required to be closely scrutinised. As said above, there is difference between the provisions made in section 108 of the Act and the provisions made in section 164 of the Code. Looking to the difference in the language of the two sections, it was not necessary to project the provisions made in sub-section (2) of section 164 of the Code in section 108 of the Act.

12. On the other hand, it would be relevant to consider certain decisions shown by the learned Advocate for the respondents. In the case of B K Patel v. Asstt.Collector of Customs, reported in 1998 (2) GLR 1319, the Hon'ble Supreme Court has laid down that the statement recorded under section 108 of the Act by the Customs Officer are admissible in evidence. While so doing, the Supreme Court has considered some earlier decisions of the Supreme Court also.

13. Full Bench of this Court has observed in the case of H R Vyas v. K V Patel, reported in 1991 (1) GLR 346,

that the Customs Officer can call upon a person suspected of being engaged in smuggling activity to make statement or furnish information both at the stage of collection of evidence and at the state of enquiry under section 124 of the Customs Act. The Full Bench also observed that the view taken in 1985(2) GLR 146 is incorrect to some extent. In the case of Haroom Haji v. State of Maharashtra, reported in AIR 1968 SC 832, it has been observed that the statement made in answer to notice issued under section 171-A of the Sea Customs Act, 1878 are not confessions recorded by the Magistrate under section 164 of the Code. In the case of K T M S Mohd. v. Union of India, reported in (1992) 3 SCC, 178, it has been observed that the statement obtained under section 409 of the Foreign Exchange Regulation Act, 1973 must be voluntary. At the same time, it has been observed therein that when a statement is disputed by alleging that it was obtained by inducement, coercion, threat, promise or any other improper means, then it is for the maker of the statement to establish that it was involuntary and extracted by such illegal means.

14. In the present case, we find that there is no material shown to me from which it can be gathered that the statement made by the present petitioner before the empowered authority was not made voluntarily. The two courts below have recorded findings of fact that the statements were voluntary. In absence of any material contrary to the said finding, it is not open to this court to record a different finding of fact in this revision application. Under the aforesaid set of facts, I am of the opinion that while recording statement under section 108 of the Customs Act, it was never necessary for the empowered authority to give caution or notice to the petitioner that he was not bound to make statement and that even when he made a statement, it would be used as evidence against him. As said above, the two courts below have found that the statement recorded by the empowered authority was voluntary and, therefore, there is no reason to differ from the view adopted by the two courts below.

15. It is to be considered that this is not an appeal but a revision wherein the power and jurisdiction of the Court are very limited. This court cannot reappreciate the evidence unless it is found and shown that the findings of the two courts below are eminently opposed to the evidence on record. The learned Advocate for the petitioner has not been able to show that the findings of the two courts below are against the weight of evidence on record. Therefore, there is no reason to differ from

the view adopted by the two courts below.

16. Then, it is required to be considered that the authority concerned has proceeded on the suspected information received by it. Then, it is required to be considered the case of Union of India v. Shyamsundar reported in AIR 1994 SC 485. There it has been observed that when a Customs Officer has seized foreign made wrist watches from accused on a reasonable belief, the court is bound to accept the belief of the officer. In other words, the court cannot sit in appeal over the said decision arrived at by the said Officer. It is further observed that when the accused did not prove that the goods were not smuggled as required under section 123 of the Customs Act, the presumption would establish that the goods seized were smuggled goods and the accused were liable for conviction. Almost a similar view was taken in the case of State of Gujarat v. Mohanlal reported in AIR 1987 SC 1321.

17. Learned Advocate for the petitioner has then argued that the petitioner was simply a driver of the Indian Airlines and, therefore, a very harsh punishment should not have been inflicted on him. Now it is to be seen that the petitioner was a public servant employed in a Public Sector Enterprise. In fact, he was required to see that no illegal activity is committed within his knowledge. He was also required to immediately inform the concerned authority in case he came to know about such illegal activity being committed within his knowledge or information. In the present case, he acted quite indifferently. He was a driver of a coach belonging to Indian Airlines. He assisted carrying of gold in machine tool box. Ordinarily passengers requiring to carry prohibited articles, would not have access to machine tool box. The brain used by the present petitioner in the manner in which he assisted in carrying of gold was really an evidence of his involvement in the offence. Ordinarily, a coach would not be searched by Customs Officers. Same way, the personal search of the officers and servants of Indian Airlines may also not be seriously undertaken. Considering these things, the petitioner being the driver of the coach appears to have permitted to carry the gold in the machine tool box. Therefore, the way in which he committed the offence of assisting other two accused in carrying the gold from one place to another seriously implicated the petitioner in the offence. He was a public servant working with a Public Sector Enterprises and, therefore, the offence committed by him cannot be viewed lightly. The offence in question is an

Anti-national activity and, therefore, also the offence could not be lightly viewed.

18. In the case of B M Chudasama v. Ismail, reported 1984 (2) GLR 912. It has been observed that deterrent punishment is called for in offence under section 135 of the Act. Even a similar view has been adopted in the case of State of Gujarat v. Manharlal A Soni, reported in 1976 GLR 427.

19. Learned Advocate for the petitioner has also submitted that the two courts below ought to have considered the provisions of section 360 as well as the provisions made in the Probation of Offenders Act, 1958. As against this, learned Advocates for the respondents have relied upon the provisions made in section 140-A of the Act wherein it has been laid down as follows:

> "140-A. Application of section 562 of the Code of Criminal Procedure, 1898 and of the Probation of Offenders Act, 1958 - (1) Nothing contained in section 562 of the Code of Criminal Procedure, 1898 or in the Probation of Offenders Act, 1958, shall apply to a person convicted of an offence under this Act unless that person is under eighteen years of age.
>
> (2) The provisions of sub-section (1) shall have effect notwithstanding anything contained in sub-section (3) of section 135."

20. On a bare perusal of section 140-A of the Customs Act, it becomes clear that the provisions relating to the Probation are not applicable to the punishment warranted under the Customs Act. When there is statutory provision omitting the provisions of Probation of Offenders Act as well as provisions for extending benefit of probation, then in that case, it was not open for the two courts below to extend the benefit of probation to the petitioner. It is true that in section 140-A of the Act, it has been provided that an exception can be made in a case of a convicted person below the age of 18 years. At the same time, it is nobody's case that the petitioner was below 18 years at the time of committing the offence in question. Therefore, no benefit of probation can be legally extended to the petitioner who has been convicted for an offence punishable under the Customs Act. Therefore, even this argument cannot be accepted.

21. It has further been contended that the petitioner was simply a driver and, therefore, the question of

punishment to be awarded to him could be considered leniently to some extent. As a public servant, instead of protecting the interest of the State, he has acted against the interest of the State and, therefore, his involvement cannot be said to be such which could be leniently dealt with. In above view of the matter, I am of the opinion that considering the judgments and conviction orders recorded by the two courts below, no illegality is shown to have committed by the two courts below. It cannot be said that the two courts below have committed illegality in convicting the present petitioner for the aforesaid offence. As said above, this court cannot reappreciate the evidence on record as it is not found or shown to me that the appreciation of evidence by the two courts below is illegal. It is not found or shown to me that the two courts below have considered the some evidence which was legally inadmissible in evidence. It is not shown to me that some evidence in favour of the petitioner has not been appreciated by the two courts below. In the facts and circumstances of the case, I do not find any merit in the present revision and consequently, the revision fails and it is required to be dismissed at the admission stage.

In the result, this Revision Application is ordered to be dismissed at the admission stage. Notice discharged.

Date:22.6.2001 [D P Buch, J.]
msp